

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

SHEAWN SMITH,

Plaintiff,

-vs-

MEMORANDUM & ORDER

12-CV-6035-CJS

TIMOTHY DONAHER, *et al.*,

Defendants.

Siragusa, J. This prisoner civil rights case is before the Court on Plaintiff's motion for a default judgment, Aug. 7, 2012, ECF No. 15. Federal Rule of Civil Procedure 55 requires that before a default judgment can be granted, the plaintiff must obtain a Clerk's entry of default. *See Kearney v. New York State Legislature*, 103 F.R.D. 625, 628 (E.D.N.Y. 1984). To obtain this default, a plaintiff must show that the opposition failed to defend the allegations. Here, Plaintiff alleges that Defendants failed to respond to his Amended Complaint within twenty-one days of receiving service of a summons and complaint pursuant to Federal Rule of Civil Procedure 12(a)(1)(A).

The Clerk's docket shows that defendants Patrick O'Flynn ("O'Flynn"), Ronald Harling ("Harling"), and John Lapira ("Lapira") acknowledged receipt of the Complaint and Summons on July 31, 2012. See ECF No. 20. Compliantly, Defendants' attorney filed a motion to dismiss on August 20, 2012, twenty days after the acknowledgment of service. Therefore, no default could be entered against O'Flynn, Harling, or Lapira. However, the docket lacks any proof as to when defendant Thomas Beilein ("Beilein") received the Complaint and Summons. Accordingly, it is hereby

ORDERED, that Plaintiff's motion for default judgment against defendants O'Flynn, Harling, and Lapira is denied; and it is further

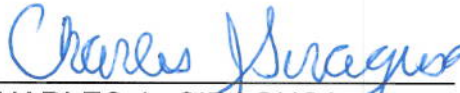
ORDERED, that defendant Beilein provide the Court, not later than November 1, 2012, with evidence showing that his motion to dismiss, which he filed on August 3, 2012, was timely; and it is further

ORDERED, that defendant Beilein's failure to provide the Court with evidence that his motion to dismiss was timely may result in an entry of a default.

IT IS SO ORDERED.

Dated: October 19, 2012
Rochester, New York

ENTER:



CHARLES J. SIRAGUSA
United States District Judge